

In the Award entered May 21, 2009, the Administrative Law Judge (ALJ) found that claimant's injury suffered in an accident in February 2007 was a new and distinct accident from claimant's original work-related accident in December 2003. Accordingly, he found that the medical expenses related to the February 2007 incident were not compensable under the Workers Compensation Act. Further, the ALJ held that temporary total disability compensation paid to claimant does not affect the cap on death benefits payable to her dependents after her death, and respondent is not entitled to a credit for the same. In the Nunc Pro Tunc Award, also dated May 21, 2009, the ALJ ordered respondent to pay claimant's dependents death benefits as set out in K.S.A. 2003 Supp. 44-510b in the amount of \$293.33 per week from December 8, 2003, the date of claimant's work-related accident, until the cap of \$250,000 has been paid in full.

The Board has considered the record and adopted the stipulations listed in the Award.¹

ISSUES

Claimant contends the medical expenses incurred as a result of the deceased claimant's February 2007 injury were a natural and probable consequence of her original injury and, therefore, requests that the Board order respondent to pay those bills.

Respondent argues that claimant's February 2007 accident and injury were not a natural and probable consequence of claimant's original injury, and the ALJ's finding on that issue should be affirmed. Respondent, however, requests that the Board find that it is entitled to a credit for the amount of temporary total disability compensation paid to the claimant before her death against its maximum liability of \$250,000 in death benefits to claimant's surviving husband and minor child.

The issues for the Board's review are:

(1) Was claimant's February 2007 accident and injury a natural and probable result of her original work-related injury?

(2) Is respondent entitled to a credit for the amount of temporary total disability compensation paid to claimant before her death against its maximum liability of \$250,000 in death benefits to claimant's surviving husband and minor child?

(3) When do death benefits commence?

FINDINGS OF FACT

On December 8, 2003, claimant was involved in a motor vehicle accident while at work for respondent. As a result of that accident, claimant suffered physical injuries, including permanent paraplegia, and was confined to a wheelchair. She was required to live in a nursing home about 50 minutes away from her home. Claimant died on November 28, 2007, as a result of complications from her work-related injuries. It is uncontroverted that her surviving spouse, Timmy Thompson, and surviving minor child, Michelle Thompson, are entitled to death benefits pursuant to K.S.A. 2003 Supp. 44-510b.

¹ Stipulation No. 10 of the ALJ's Award and Nunc Pro Tunc Award states that claimant's average weekly wage was \$293.33. In fact, the transcript of the Regular Hearing, page, 6, sets out the parties' agreement that claimant's average weekly wage was \$251.87. However, the parties stipulated that in this case, the compensation rate would be \$293.33 per week.

Because of claimant's condition, she was unable to travel in a standard motor vehicle. She was required to be transported by EMS transport vans with specialized equipment. On February 17, 2007, she was being transported from the nursing home in Dewey, Oklahoma, to Edna, Kansas, so she could attend a birthday party. On the way to the party, the driver of the EMS van applied her brakes, and claimant fell out of her wheelchair onto the floor of the van. Because the driver could not get claimant back into her wheelchair, the driver got two volunteers to help claimant back into her wheelchair. While being lifted back into her wheelchair, claimant felt a snap in her left leg. It was later determined that claimant had suffered a broken leg, for which she had surgery.

Claimant contends that if she had not been a paraplegic, she would not have rolled forward in her wheelchair and fallen, and it would not have been necessary for anyone to help her back up into her seat. Dr. Jeff Halford, who is board certified in rehabilitation and physical medicine, treated claimant for her injuries relating to her original injury. He testified that because of claimant's spinal cord injury, she likely suffered from disuse osteoporosis which likely contributed to her fracture.

This issue was before the Board previously on an appeal from a preliminary hearing order. At that time, a Board Member, while admitting the question was a close call, held that "based upon this record this Board Member is unable to conclude that claimant's broken leg would not have happened in the absence of her original accident and resulting paraplegia."²

It has been stipulated that claimant has paid 197.75 weeks of temporary total disability benefits at the rate of \$167.93 per week for a total of \$33,207.15. Respondent is requesting a credit in that amount against the \$250,000 it is liable to pay to claimant's surviving husband and minor child.

PRINCIPLES OF LAW AND ANALYSIS

(1) Was claimant's February 2007 accident and injury a natural and probable result of her original work-related injury?

Claimant contends that her fall from her wheelchair and her resulting leg fracture were a natural consequence of her original work-related accident and resulting paraplegia. Claimant was in a wheelchair because of her paraplegia. She would not have fallen from her wheelchair had she not been a paraplegic and in a wheelchair. Moreover, claimant would not have suffered a leg fracture, either from the fall or from simply being lifted back into her wheelchair, if she did not have brittle bones due to her paraplegia.

² *Thompson v. Renzenberger, Inc.*, No. 1,025,518, 2007 WL 2586176 (Kan. WCAB Aug. 28, 2007).

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*³, the court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*⁴, the Court attempted to clarify the rule:

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig*⁵, the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber*⁶, the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury,

³ *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

⁴ *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

⁵ *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

⁶ *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, rev. denied 231 Kan. 800 (1982).

which was “a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back.”⁷

On February 17, 2007, claimant was being transported in a van. During that trip the driver applied the brakes and claimant fell out of her wheelchair. It was not an emergency stop or a sudden stop. Rather, the fall occurred in the normal course of driving the van. Either as a result of the fall or as a result of being lifted back into her wheelchair, or both, claimant suffered a fracture of her femur. Her treating physician, Dr. Halford, opined that because of her paraplegia, it was more probable than not that she suffered from disuse osteoporosis in her leg bones and this contributed to the fracture. As such, claimant’s left leg fracture would not have happened in the absence of her original accident and resulting paraplegia. Paraphrasing the language of *Jackson*, the new and distinct leg fracture injury flowed from the primary spinal cord injury. As such, the leg fracture is compensable as a direct and natural result of the spinal cord injury which arose out of and in the course of claimant’s employment with respondent.

(2) Is respondent entitled to a credit or offset against the death benefits for the amount of temporary total disability compensation paid to claimant before her death?

K.S.A. 2003 Supp. 44-510b states that where death results from injury leaving a surviving legal spouse or a wholly dependent child, or both, the employer shall be liable to pay

. . . an initial payment of \$40,000 to the surviving legal spouse or a wholly dependent child or children or both. . . . Thereafter, such dependents shall be paid weekly compensation, except as otherwise provided in this section, in a total sum to all such dependents, equal to 66 2/3% of the average gross weekly wage of the employee at the time of the accident, . . . but in no event shall such weekly benefits exceed the maximum weekly benefits provided in K.S.A. 44-510c and amendments thereto, nor be less than a minimum weekly benefit of the dollar amount nearest to 50% of the state’s average weekly wage⁸

K.S.A. 2003 Supp. 44-510b(h) states that the maximum amount of benefits payable under 44-510b, including the initial payment of \$40,000, “shall not exceed a total amount of \$250,000 and when such total amount has been paid the liability of the employer for any further compensation under this section to dependents, other than minor children of the employee, shall cease.”

⁷ *Id.* at 728.

⁸ K.S.A. 2008 Supp. 44-510b(a).

In *Riley*,⁹ the Kansas Court of Appeals stated:

We have held for many years in Kansas that our compensation act creates a right in the injured worker for the loss resulting from the injury and also creates a distinct and separate right of action in the dependents of the worker in the event death results from the injury.

In 1974 the language in K.S.A. 44-510b providing for a deduction for compensation previously paid to the injured worker was deleted.¹⁰ When the Legislature modifies a statute it is presumed to have intended to either clarify the meaning or change the effect of the statute.¹¹ “There is a presumption that the legislature does not intend to enact useless or meaningless legislation.”¹² It is apparent to this Board that by deleting the language providing for an offset of prior compensation against death benefits, the Legislature intended for the entire death benefit to be paid, subject to the statutory maximum. The Board holds that the claim for death benefits by decedent’s dependents is separate and exclusive of the compensation benefits paid to the injured worker during her life.

(3) When do death benefits commence?

Neither party challenged the ALJ’s award calculation with respect to the date death benefits should commence. Nevertheless, following oral argument, the Board requested that the parties provide it briefs on the question of whether death benefits should commence on the claimant’s date of accident or the date of her death. In its letter to the parties, the Board asked:

Claimants’ Application for Board Review and Docketing Statement lists as an issue “whether the Award sets forth the compensation due and to become due to Claimants with sufficient specificity.” But at oral argument, claimants’ counsel announced that the ALJ’s subsequent Award Nunc Pro Tunc satisfied claimants’ issue. Although the Board indicated that it might try to clarify that portion of the Award in its Order, the question of when benefits commence was not discussed or argued. And it was not briefed.

⁹ *Riley v. National Mills, Inc.*, 19 Kan. App. 2d 541, 543, 873 P.2d 214, rev. denied 255 Kan. 1003 (1994); see *Routh v. List & Weatherly Construction Co.*, 124 Kan. 222, 257 Pac. 721 (1927).

¹⁰ L. 1974, ch. 203, sec. 11.

¹¹ *Watkins v. Hartsock*, 245 Kan. 756, 759, 783 P.2d 1293 (1989).

¹² *KPERS v. Reimer & Koger Assocs., Inc.*, 262 Kan. 635, 643, 941 P.2d 1321 (1997) (quoting *Todd v. Kelly*, 251 Kan. 512, 515, 837 P.2d 381 [1992]).

The ALJ's Award Nunc Pro Tunc orders benefits to commence on the date of accident. K.S.A. 44-510b provides that the initial payment of \$40,000 is to be made to the employee's survivors and "thereafter" weekly compensation benefits are to be paid. This suggests benefits do not commence until the date of death.

The parties are requested to provide the Board with either a stipulation or supplemental briefs on the question of when death benefits should commence.¹³

Claimant argues the ALJ was correct to begin death benefits on the date of accident. In support, claimant points to K.S.A. 44-535, which provides:

The right to compensation shall be deemed in every case, including cases where death results from the injury, to have accrued to the injured workman or his dependents or legal representatives at the time of the accident, and the time limit in which to commence proceedings for compensation therefor shall run as against him, his legal representatives and dependents from the date of the accident.

Not only would it be illogical to pay death benefits before a death has occurred, but in this case claimant was receiving weekly disability compensation payments between the date of her accident and the date of her death. Therefore, commencing the payment of death benefits on the date of accident would result in the overlapping of compensation payments. Moreover, K.S.A. 44-510b, which is the specific statute pertaining to the payment of compensation when death results from injury, clearly contemplates those payments are to commence with the date of death. Subsection (a) provides for a lump sum payment "[i]f an employee **leaves** any dependents [t]here shall be an initial payment of \$40,000 to the **surviving** legal spouse The initial payment shall be immediately due and payable and apportioned 50% to the **surviving** legal spouse and 50% to the dependent children. **Thereafter**, such dependents shall be paid weekly compensation" [Emphasis added.]

The Board concludes that the plain meaning of K.S.A. 44-510b is that although the claimant's right to compensation accrues on the date of accident, the right to death benefits to claimant's dependents begins and, therefore, death benefits commence, on the decedent's date of death.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award and Nunc Pro Tunc Award of Administrative Law Judge Thomas Klein dated May 21, 2009, are modified to find respondent and its insurance carrier liable for the medical treatment expenses resulting from the February 17, 2007, accident and injury and to commence the

¹³ Board's letter to parties' counsel dated September 11, 2009.

payment of death benefits to claimant's dependents on the date of claimant's death but are otherwise affirmed.

A death benefit award is hereby entered in favor of Timmy Thompson, as claimant's surviving spouse, and Michelle Thompson¹⁴, as claimant's surviving minor dependent, against respondent and its insurance carrier for an accidental injury that occurred on December 8, 2003, and claimant's resulting death, which occurred on November 28, 2007. Benefits are based on a compensation rate of \$293.33 per week and commence on November 28, 2007, the date of death.

Pursuant to the provisions of K.S.A. 2003 Supp. 44-510b, there shall be an initial payment of \$40,000, followed by weekly compensation payments of \$293.33. One-half of the \$40,000 lump sum and one-half of the weekly compensation payments shall be paid to Timmy Thompson, as surviving spouse, and one-half of the payments shall be paid to Michelle Thompson, who was a minor dependent at the time of claimant's accident and also at the time of claimant's death. The payments shall continue to Michelle Thompson until she reaches 18 years of age. After that date, she will continue to receive payments until she reaches 23 years of age only if she is enrolled as a full-time student in an accredited institution of higher education or vocational education, or if she is physically or mentally unable to earn wages in any type of substantial or gainful employment, subject to the statutory maximum amount of compensation payable, whereupon all rights to benefits terminate.

There is due and owing to Timmy Thompson, as surviving spouse, \$20,000, plus, for the period from November 28, 2007, through October 14, 2009, 98 weeks of compensation at the rate of \$146.67 per week or \$14,373.66, for a total due and owing of \$34,373.66, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, payments will continue at the rate of \$146.67 per week subject to the provisions of K.S.A. 2003 Supp. 44-510b, or until further order of the Director.

There is due and owing to Michelle Thompson \$20,000, plus, for the period from November 28, 2007, through October 14, 2009, 98 weeks of compensation at the rate of \$146.67 per week or \$14,373.66, for a total due and owing of \$34,373.66, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, payments will continue at the rate of \$146.67 per week subject to the provisions of K.S.A. 2003 Supp. 44-510b, or until further order of the Director.

Respondent and its insurance carrier shall pay all reasonable and related medical treatment expenses incurred by claimant, including the expenses resulting from the accident that occurred on February 17, 2007, subject, of course, to the provisions of the Kansas fee schedule.

¹⁴ Michelle Thompson turned 18 years of age on June 31, 2008.

IT IS SO ORDERED.

Dated this _____ day of October, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John L. Carmichael, Attorney for Claimant
 Jennifer Arnett, Attorney for Respondent and its Insurance Carrier
 Thomas Klein, Administrative Law Judge